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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 LEVI B.,

7 Plaintiff,

8 v.

9 COMMISSIONER OF SOCIAL
SECURITY,

10 Defendant.

Case No. 2:19-cv-00196-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

11 Plaintiff has brought this matter for judicial review of Defendant's denial of his
12 application for disability insurance benefits.

13 The parties have consented to have this matter heard by the undersigned
14 Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule
15 MJR 13. For the reasons set forth below, the undersigned agrees that the ALJ erred,
16 and the ALJ's decision is reversed and remanded for further administrative proceedings.

17 I. ISSUES FOR REVIEW

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- 19 1. Did the ALJ err in evaluating Plaintiff's non-severe impairments at
step two?
 - 20 2. Did the ALJ properly evaluate the medical opinion evidence?
 - 21 3. Did the ALJ properly evaluate the impact of medication side
effects?
 - 22 4. Did the ALJ err in evaluating Plaintiff's symptom testimony?
 - 23 5. Did the ALJ err in finding there were a significant number of jobs
Plaintiff could perform at step five?
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1 II. BACKGROUND

2 On June 11, 2016, Plaintiff filed an application for disability insurance benefits,
3 alleging a disability onset date of December 3, 2015. AR 15, 221-22. Plaintiff's
4 application was denied upon initial administrative review and on reconsideration. AR 15,
5 161-63, 167-72. A hearing was held before Administrative Law Judge ("ALJ") Malcolm
6 Ross on February 13, 2018. AR 86-125. On May 29, 2018, the ALJ issued a decision
7 finding that Plaintiff was not disabled. AR 12-30. The Social Security Appeals Council
8 denied Plaintiff's request for review on December 6, 2018. AR 1-6.

9 On February 25, 2019, Plaintiff filed a complaint in this Court seeking judicial
10 review of the ALJ's written decision. Dkt. 6. Plaintiff asks this Court to reverse the ALJ's
11 decision and to remand this case for an award of benefits or additional proceedings.
12 Dkt. 14, p. 16.

13 III. STANDARD OF REVIEW

14 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
15 denial of social security benefits if the ALJ's findings are based on legal error or not
16 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427
17 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
18 1999)).

19 IV. DISCUSSION

20 In this case, the ALJ found that Plaintiff had the following severe, medically
21 determinable impairments: degenerative disc disease; left thumb arthritis; adjustment
22 disorder with depressed mood and anxiety; alcohol use disorder; and obesity. AR 17.
23 The ALJ also found that Plaintiff had several non-severe impairments, including bilateral
24 carpal tunnel syndrome, post-traumatic stress disorder ("PTSD"), attention deficit
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1 hyperactivity disorder (“ADHD”), left shoulder degenerative changes, and allergic
2 rhinitis. AR 17-18.

3 Based on the limitations stemming from these impairments, the ALJ assessed
4 Plaintiff as being able to perform a reduced range of medium work. AR 19-20. Relying
5 on vocational expert (“VE”) testimony, the ALJ found that Plaintiff could not perform his
6 past work, but determined that there were other light, unskilled jobs Plaintiff could
7 perform; therefore the ALJ determined at step five that Plaintiff was not disabled. AR
8 28-30, 121-24.

9 A. Whether the ALJ erred at steps two or three

10 Plaintiff contends the ALJ erred at steps two and three by failing to properly
11 consider the impact of Plaintiff’s non-severe impairments on his residual functional
12 capacity (“RFC”). Dkt. 14, pp. 4-8.

13 At step two of the sequential evaluation, the ALJ must determine if the claimant
14 suffers from any medically determinable impairments that are “severe.” 20 C.F.R. §
15 404.1520(a)(4)(ii). An impairment is not considered to be “severe” if it does not
16 “significantly limit” a claimant’s mental or physical abilities to do basic work activities. 20
17 C.F.R. § 404.1520(c); Social Security Ruling (“SSR”) 96-3p, 1996 WL 374181, at *1.
18 Basic work activities are those “abilities and aptitudes necessary to do most jobs.” 20
19 C.F.R. § 404.1522(b); SSR 85-28, 1985 WL 56856, at *3. An impairment is not severe if
20 the evidence establishes only a slight abnormality that has “no more than a minimal
21 effect on an individual[’]s ability to work.” SSR 85-28, 1985 WL 56856, at *3; *Smolen v.*
22 *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

23 At step three, the ALJ determines whether the plaintiff has an impairment or
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1 combination of impairments that would be of a severity that meets or equals the criteria
2 of the impairments listed in the Social Security Disability Regulations. See 20 C.F.R. §§
3 404 subpt. P, app. 1, pts. A1-B2. If the plaintiff's impairment or combination of
4 impairments meets the criteria of a listing, then the ALJ finds the claimant to be
5 disabled; if not, the ALJ proceeds to step four (residual functional capacity). *Barnhart v.*
6 *Thomas*, 540 U.S. 20, 24-25 (2003).

7 Plaintiff contends that his symptoms "significantly limit" his ability to perform basic
8 work activities, and that the ALJ erred in finding that his carpal tunnel syndrome, post-
9 traumatic stress disorder, and attention deficit hyperactivity disorder were non-severe
10 impairments. Dkt. 14, pp. 6-7. Plaintiff also asserts that the ALJ erred in determining the
11 durational requirement concerning the entire constellation of impairments – severe and
12 non-severe – that plaintiff suffers from. Dkt. 14 at 7. Plaintiff asserts that he suffered
13 from a combination of impairments for more than 12 months, and the ALJ should have
14 considered the evidence of all his impairments between December 3, 2015 (alleged
15 onset date) and February 12, 2018 (hearing date). Dkt. 14 at 2, 4-8.

16 Under 42 U.S.C. § 423(d)(1)(A), a person is disabled and is eligible to receive
17 benefits if the person has an "inability to engage in any substantial gainful activity by
18 reason of any medically determinable physical or mental impairment which can be
19 expected to result in death or which has lasted or can be expected to last for a
20 continuous period of not less than 12 months." In *Buck v. Berryhill*, the Ninth Circuit
21 emphasized that in assessing the RFC, an ALJ must consider limitations and
22 restrictions imposed by *all* an individual's impairments, even those that are not 'severe',
23 and that an RFC should be precisely the same regardless of whether certain
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1 impairments were found severe at step two of the sequential evaluation. 869 F.3d 1040,
2 1049 (9th Cir. 2017) (citing Titles II & XVI: Assessing Residual Functional Capacity in
3 Initial Claims, SSR 96-8p, 1996 WL 374184, at *5 (S.S.A. July 2, 1996)). In *Buck*, the
4 Ninth Circuit concluded that because the ALJ decided step two in the claimant's favor
5 and was required to consider all impairments in the RFC, whether “severe” or not, “[a]ny
6 alleged error is therefore harmless and cannot be the basis for a remand.” *Id.* (citing
7 *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)).

8 In finding Plaintiff’s carpal tunnel syndrome to be a non-severe impairment, the
9 ALJ reasoned that Plaintiff underwent an apparently successful bilateral carpal tunnel
10 release procedure in 2007, that there was “equivocal” evidence of a recurrence of
11 carpal tunnel syndrome in June 2016, and there was “little further mention” of carpal
12 tunnel related symptoms during the period at issue. AR 18, 370-71.

13 The “equivocal” evidence cited by the ALJ refers to the results of an
14 electrodiagnostic test of Plaintiff’s hands conducted in June 2016. AR 367-71. With
15 respect to Plaintiff’s right hand, the test results were consistent with moderate median
16 neuropathy at the wrist characterized by sensor/motor demyelination with partial chronic
17 denervation changes without evidence of ongoing axonal loss. AR 368, 371. And the
18 physician (Zachary Abbott, D.O.) also noted that given that median nerve conduction
19 study values commonly do not normalize after a clinically successful carpal tunnel
20 release, and the median nerve slowing indicated in the test “does not necessarily
21 represent true recurrent carpal tunnel syndrome.” *Id.*

22 Dr. Abbott noted that Plaintiff had the same degree of median nerve slowing in
23 his left hand, “which also calls into question the significance of the right-sided findings.”
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1 *Id.* Dr. Abbott concluded that these test results “need to be interpreted with caution and
2 clinically correlated.” *Id.*

3 The record does not contain an opinion from an acceptable medical source
4 assessing any functional limitations related to Plaintiff’s right hand, and examining
5 physician Justin Taylor, M.D. specifically opined that Plaintiff has no lifting, carrying, or
6 manipulative limitations when using his right hand. See AR 154-55, 333, 381.

7 Here, the ALJ considered Plaintiff’s carpal tunnel syndrome when assessing his
8 residual functional capacity. But it would not be accurate to conclude that the ALJ erred
9 by failing to find functional limitations related to Plaintiff’s carpal tunnel syndrome; no
10 acceptable medical source has assessed limitations related to this condition; and the
11 medical record is ambiguous as to whether Plaintiff’s carpal tunnel syndrome recurred
12 during the period at issue.

13 Regarding Plaintiff’s non-severe mental impairments, the ALJ relied on Plaintiff’s
14 August 2016 statement that he had not had any PTSD symptoms since 2006 and the
15 diagnosis of examining psychologist Alexander Patterson, Psy.D., who also concluded
16 that his PTSD was in remission. AR 17-18, 383, 386. The ALJ noted that an apparent
17 recurrence of Plaintiff’s PTSD symptoms occurred after his date last insured. AR 17-18,
18 992-1009.

19 Regarding Plaintiff’s ADHD, the ALJ noted Plaintiff’s statement to Dr. Patterson
20 that he had been diagnosed with this condition in 2011 by another therapist and had
21 been taking the stimulant Adderall to manage his condition. AR 17-18, 383-86. The ALJ
22 noted that neither Dr. Patterson nor any other acceptable medical source diagnosed
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1 Plaintiff with ADHD, and there was no evidence that Plaintiff's ADHD had any significant
2 effect on Plaintiff's functioning. AR 18, 386.

3 Neither Dr. Patterson nor the non-examining state agency psychologists, Kristine
4 Harrison, Psy.D. or Michael Brown, Ph.D. diagnosed Plaintiff with ADHD. AR 132-33,
5 136-37, 155-56. Dr. Patterson did not assess any functional limitations stemming from
6 Plaintiff's mental impairments, and Dr. Harrison and Dr. Brown (whose opinions the ALJ
7 assigned substantial weight) assessed mental limitations that would not conflict with the
8 RFC: the RFC restricted Plaintiff performing short and simple tasks, with routine,
9 repetitive instructions. AR 19-20, 27, 136-38, 155-56, 386-87.

10 There is no evidence that Plaintiff's PTSD or ADHD resulted in any work-related
11 mental limitations during the period at issue, and the Court cannot say that the ALJ
12 erred in finding these impairments non-severe or in declining to include associated
13 limitations in the RFC.

14 B. Whether the ALJ properly evaluated the medical opinion evidence

15 Plaintiff alleges that the ALJ erred in assessing Dr. Taylor's August 2016 opinion.
16 Dkt. 14, pp. 9-12.

17 In assessing an acceptable medical source – such as a medical doctor – the ALJ
18 must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of
19 either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
20 1995) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*,
21 849 F.2d 418, 422 (9th Cir. 1988)). When a treating or examining physician's opinion is
22 contradicted, the opinion can be rejected “for specific and legitimate reasons that are
23 supported by substantial evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing
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1 *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d
2 499, 502 (9th Cir. 1983)).

3 Dr. Taylor examined Plaintiff on August 27, 2016. AR 378-81. Dr. Taylor's
4 evaluation consisted of a review of the medical records, a clinical interview, and a
5 physical examination. Based on this evaluation, Dr. Taylor opined that Plaintiff would
6 have no limitations in standing, walking, or sitting. AR 381. Dr. Taylor also found that
7 Plaintiff would have no lifting, carrying, or manipulative restrictions when using his right
8 hand. *Id.*

9 Dr. Taylor opined that Plaintiff's ability to lift and carry with his left hand was
10 "limited" due to strain, and that Plaintiff should avoid lifting with the left hand "at this
11 time." *Id.* Dr. Taylor added that Plaintiff would have no limitation in his ability to reach
12 and feel with his left hand, but was limited to occasional handling and fingering. *Id.*

13 The ALJ found that most of Dr. Taylor's opinion was supported by his clinical
14 findings and the medical record, but that there was insufficient evidence to support
15 restricting all lifting on the left, a limitation in fingering, or a limitation beyond frequent
16 handling with the left upper extremity. AR 26. The ALJ reasoned that Dr. Taylor's
17 opinion regarding these limitations was inconsistent with the results of his own
18 examination, during which Plaintiff demonstrated good left hand functioning, was able to
19 remove his sandals and arm brace without difficulty, had intact grip strength, could
20 touch his fingertips to his thumbs, and was able to pick up a paperclip from a flat
21 surface. AR 26, 379-81. A finding that a medical opinion contains internal
22 inconsistencies can serve as a specific, legitimate reason for discounting it. *See Morgan*
23 *v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999); *see also Rollins v.*

1 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (upholding ALJ's rejection of internally
2 inconsistent medical opinion). Accordingly, the ALJ did not err in evaluating Dr. Taylor's
3 opinion.

4 C. Whether the ALJ properly assessed the impact of medication side effects

5 Plaintiff contends that the ALJ erred by not assessing the extent to which the side
6 effects of Plaintiff's pain medication interfered with his ability to work. Dkt. 14, p. 8, Dkt.
7 17, p. 5. Social Security regulations require an ALJ to consider side effects of
8 medication taken for pain or other symptoms when assessing allegations of disabling
9 symptoms. 20 C.F.R. § 404.1529(c)(3)(iv).

10 In evaluating the medical record, the ALJ noted that Plaintiff was taking
11 medications such as Oxycodone and Neurotonin for pain. AR 20-21. During the hearing,
12 the ALJ asked Plaintiff whether his medication caused any side effects. AR 109-10.

13 Plaintiff testified that he had difficulty driving back and forth from Portland,
14 Oregon when he was taking pain medication, which gave him an "intoxicated" feeling,
15 made him more confident than he should have been while driving, and made it difficult
16 for him to park his car. *Id.* Plaintiff testified that he was not supposed to be driving while
17 on pain medication, but he did so anyway because he had no other way to get to his
18 treatment providers in Portland. *Id.* The ALJ discussed Plaintiff's testimony when
19 assessing his allegations. AR 20.

20 While the ALJ considered this evidence, he does not appear to have specifically
21 discounted Plaintiff's statements regarding the side effects of his pain medication or
22 assessed an RFC limitation that would account for Plaintiff's driving difficulties. Given
23 Plaintiff's apparently dangerous mindset when taking his medication, and considering
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1 that an inability to drive a car to work might significantly impact the number of jobs
2 available at step five, the Court cannot say that the failure to include a limitation related
3 to Plaintiff's medication side effects constitutes harmless error. On remand, the ALJ
4 shall either provide a clear and convincing reason for not including a limitation related to
5 the side effects of Plaintiff's medication in the RFC, or if crediting Plaintiff's statements
6 as true, assess the functional impact of such a limitation on Plaintiff's ability to perform
7 other work at step five.

8 D. Whether the ALJ properly evaluated Plaintiff's symptom testimony

9 Plaintiff contends that the ALJ erred in evaluating his symptom testimony. Dkt.
10 14, pp. 15-16. Plaintiff contends that because the ALJ did not properly evaluate the
11 objective medical evidence, he could not have properly assessed Plaintiff's symptom
12 testimony. *Id.* at 16.

13 Plaintiff does not allege any specific error in the ALJ's evaluation of his subjective
14 allegations. Given the lack of specificity in Plaintiff's argument, Plaintiff has failed to
15 demonstrate any harmful error on this issue. *See Bailey v. Colvin*, 669 Fed. Appx. 839,
16 840 (9th Cir. 2016) (citing *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012))
17 (finding no error where the claimant did not "demonstrate prejudice from any errors").

18 E. Whether the ALJ properly erred at step five

19 Plaintiff contends that the ALJ erred by finding that there were a significant
20 number of jobs Plaintiff could perform at step five of the sequential evaluation. Dkt. 14,
21 pp. 13-15. Because the ALJ's re-evaluation of Plaintiff's medication side effects may
22 result in additional RFC limitations, the Court declines to address this argument, and
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1 instead directs the ALJ to re-assess step five of the sequential evaluation as appropriate
2 on remand.

3 F. Additional evidence

4 The record contains evidence submitted by Plaintiff after the ALJ issued his
5 decision. AR 36-84. The Appeals Council denied review of Plaintiff's claim and opted
6 not to exhibit this evidence, reasoning that it did not show a reasonable probability that it
7 would change the outcome of the ALJ's decision. AR 2.

8 This Court must consider this additional material in determining whether the
9 ALJ's decision is supported by substantial evidence. *See Brewes v. Commissioner of*
10 *Social Security*, 682 F.3d 1157, 1160 (9th Cir. 2012) (when a claimant submits evidence
11 for the first time to the Appeals Council, which considers that evidence in denying
12 review of the ALJ's decision, the new evidence is part of the administrative which the
13 district court must consider in determining whether the Commissioner's decision is
14 supported by substantial evidence).

15 The evidence in question consists of documents related to Plaintiff's worker's
16 compensation claim, an opinion from one of Plaintiff's treatment providers, a
17 psychological assessment from 2011, treatment notes, and a letter from Plaintiff's
18 former employer indicating that Plaintiff left his job in December 2015 for reasons
19 unrelated to his thumb injury. *See* AR 36-84; *see also Bruton v. Massanari*, 268 F.3d
20 824, 828 (9th Cir. 2001) (noting that an ALJ may consider that a claimant stopped
21 working for reasons unrelated to the allegedly disabling condition in evaluating her
22 symptom complaints).

1 Because the Court has already concluded that the ALJ's decision is not
2 supported by substantial evidence, the Court declines to consider this evidence, and
3 instead directs the ALJ to evaluate this evidence on remand.

4 G. Remand With Instructions for Further Proceedings

5 Plaintiff asks this Court to reverse the ALJ's decision and to remand this case for
6 an award of benefits or additional proceedings. Dkt. 14, p. 16. "The decision whether to
7 remand a case for additional evidence, or simply to award benefits[,] is within the
8 discretion of the court." *Trevizo v. Berryhill*, 871 F.3d 664, 682 (9th Cir. 2017) (quoting
9 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If an ALJ makes an error and
10 the record is uncertain and ambiguous, the court should remand to the agency for
11 further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Likewise, if
12 the court concludes that additional proceedings can remedy the ALJ's errors, it should
13 remand the case for further consideration. *Revels*, 874 F.3d at 668.

14 The Ninth Circuit has developed a three-step analysis for determining when to
15 remand for a direct award of benefits. Such remand is generally proper only where

16 "(1) the record has been fully developed and further administrative
17 proceedings would serve no useful purpose; (2) the ALJ has failed to
18 provide legally sufficient reasons for rejecting evidence, whether claimant
19 testimony or medical opinion; and (3) if the improperly discredited
20 evidence were credited as true, the ALJ would be required to find the
21 claimant disabled on remand."

22 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.
23 2014)).

24 The Ninth Circuit emphasized in *Leon v. Berryhill* that even when each element is
25 satisfied, the district court still has discretion to remand for further proceedings or for
award of benefits. 80 F.3d 1041, 1045 (9th Cir. 2017).

1 Here, the ALJ must re-evaluate the impact of Plaintiff's medication side effects on
2 the RFC. Because it is unclear precisely what impact an RFC limitation related to these
3 side effects would have on Plaintiff's ability to perform work at step five, remand for
4 further proceedings is the appropriate remedy.

5 CONCLUSION

6 Based on the foregoing discussion, the Court finds the ALJ erred when he/she
7 determined plaintiff to be not disabled. Defendant's decision to deny benefits is
8 therefore REVERSED and this matter is REMANDED for further administrative
9 proceedings. The ALJ is directed to re-assess the vocational impact of Plaintiff's
10 medication side effects on remand.

11 Dated this 6th day of February, 2020.

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13 Theresa L. Fricke
14 United States Magistrate Judge
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